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No. 94-1340

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITIZENS BANK OF MARYLAND,

Petitioner,

v.

DAVID STRUMPF,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a bank creditor may refuse a bankrupt depositor's request to withdraw funds pending determination by the bankruptcy court of the bank's setoff right, without violating the bankruptcy stay under 11 U.S.C. §362(a).

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REPLY BRIEF FOR THE PETITIONER

Petitioner, Citizens Bank of Maryland, hereby replies to the arguments set forth in the Brief for the Respondent, and respectfully urges this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

I.

STRUMPF'S ARGUMENT THAT CITIZENS WAIVED ITS SETOFF RIGHT IS NOT PROPERLY BEFORE THIS COURT AND IGNORES THE EXPRESS LANGUAGE OF SECTION 553 OF THE BANKRUPTCY CODE.

A. Strumpf's "Waiver" Argument, Not Having Been Raised Below, Has Been Waived.

This Court granted the petition for a writ of certiorari filed by Petitioner, Citizens Bank of Maryland ("Citizens"),[1] to resolve the question presented: "Whether a bank creditor may refuse a bankrupt depositor's request to withdraw funds pending a determination by the bankruptcy court of the bank's setoff right, without violating the bankruptcy stay under 11 U.S.C. §362(a)." *See* Citizens' Petition for a Writ of Certiorari, filed on February 6, 1995 and granted on March 27, 1995. The Respondent and debtor in bankruptcy, David Strumpf ("Strumpf"), attempts to avoid this important issue by asserting as his lead argument, for the first time at any stage of this case, that Citizens waived its setoff right by failing to object to the confirmation of Strumpf's Chapter 13 plan. *See* Brief for the Respondent ("Respondent's Brief") at 7-12.

This argument was never raised below, in the bankruptcy court, the district court, or the court of appeals. Having never been asserted below, Strumpf's waiver argument was never mentioned by either the bankruptcy court or the district court in their respective opinions. (J.A. 27a-38a). The Fourth Circuit likewise did not address the issue in its opinion. (J.A. 39a-46a).

[1] Pursuant to Supreme Court Rule 29.1, Citizens respectfully refers the Court to the Brief for the Petitioner, at 3 n.2, for its parent and subsidiaries list.

Having failed to raise the waiver argument below, it is too late for Strumpf to do so now. This Court pronounced long ago, and reiterated more recently, the prohibition against raising arguments for the first time in this Court:

> Without cross-petitioning for certiorari, a prevailing party may, of course, "defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below. . . . Although "we could consider grounds supporting [the] judgment below different from those on which the Court of Appeals rested its decision," "where the ground presented here has not been raised below we exercise this authority 'only in exceptional cases.' "

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38-39 (1989) (citations omitted) (citing *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983), quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)). *See also United States v. Alvarez-Sanchez*, ___ U.S. ___, 114 S. Ct. 1599, 1605 n.5 (1994) ("Finding no exceptional circumstances that would warrant reviewing a claim that was waived below, we adhere to our general practice and decline to address respondent's [new] Fourth Amendment argument."). No exceptional circumstances exist in this case, and this Court should adhere to its general practice and decline to address the issue. It is also this Court's general practice not to consider issues not raised in the petitioner's question presented to the Court. *See Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 111 S. Ct. 913, 917 (1991) (Court rejected

respondent's attempt to raise argument not presented in petitioner's petition for a writ of certiorari). The effect of a Chapter 13 plan confirmation on a creditor with an undisputed right of setoff, where the plan makes no mention of the creditor's setoff right, is not an issue fairly encompassed within the question presented in Citizens' petition for a writ of certiorari, and Strumpf did not file a cross-petition for a writ of certiorari on this new issue. Accordingly, this Court should not consider Strumpf's new "waiver" argument.

Furthermore, Citizens' right of setoff was conclusively determined by the bankruptcy court when it granted Citizens' motion for relief from the automatic stay to set off Strumpf's bank deposits against his obligations to Citizens, and that determination was never appealed. (J.A. 29a-30a). Citizens' entitlement to a right of setoff against Strumpf's bank deposits thus was finally decided and cannot now be questioned. *See Morely Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937) (failure to cross-appeal on an issue waives the appellee's right to assert it in the reviewing court).

B. Section 553(a) Of The Bankruptcy Code Expressly Preserves Citizens' Right Of Setoff.

Even if this Court were to depart from its general practice and consider Strumpf's "waiver" argument, the argument should be rejected as without merit. Strumpf cites no case or other authority in support of his argument, other than an unexplained citation to 11 U.S.C. §1327(a). Section 1327(a) simply provides that the terms of a confirmed Chapter 13 plan bind the debtor and each creditor, "whether or not the claim of such creditor is provided for by the plan, and whether or not

such creditor has objected to . . . the plan." 11 U.S.C. §1327(a) (1988).

In this case, Strumpf's Chapter 13 plan provided that unsecured creditors would be paid "pro-rata" from his monthly payments of $100 to the Chapter 13 trustee. Citizens' right to receive payments under the plan as an unsecured creditor is not at issue in this case. The plan makes no mention of Citizens or Citizens' right of setoff, which is the issue before this court. (J.A. 3a-4a). It certainly does not provide that Citizens would forfeit its setoff right against Strumpf's bank deposits at Citizens. *Id.* Accordingly, §1327(a) in no way supports Strumpf's attempt to challenge Citizens' setoff right.

Moreover, Strumpf's argument ignores 11 U.S.C. §553(a), which provides in relevant part:

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case . . . .

11 U.S.C. §553(a) (1988).[2] Section 553(a), which speceifically governs the treatment of setoff rights in the Bankruptcy Code ("the Code"), thus precludes an argument that §1327(a), or any other Code provision (other than the expressly excepted §§362 and 363),[3] deprived Citizens of its setoff right. *See In re Tillery*, 179 B.R. 576, 578-79 (Bankr. W.D. Ark. 1995) (holding that confirmation of a Chapter 13 plan did not alter the

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[2]The exceptions to the prohibition in §553 against modifying a creditor's setoff right, set forth in 11 U.S.C. §553(a)(1), (2), and (3), have no relevance to this case.

[3]None of the provisions of 11 U.S.C. §§362 and 363 eliminate Citizens' setoff right. *See* Petitioner's Brief at 18-22.

creditor's right of setoff); *In re Olson*, 175 B.R. 30, 32 (Bankr. D. Neb. 1994) (creditor retained setoff right notwithstanding confirmation of a Chapter 13 plan); *In re Whitaker*, 173 B.R. 359, 362-63 (Bankr. S.D. Ohio 1994) (rejecting argument that §1327(a) affected creditor's right of setoff). *See also In re De Laurentiis Entertainment Group, Inc.*, 963 F.2d 1269, 1276-77 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 330 (1992) (holding no waiver of setoff right in Chapter 11 case).

II.

CITIZENS' REFUSAL TO PERMIT STRUMPF TO WITHDRAW BANK FUNDS PENDING THE BANKRUPTCY COURT'S DETERMINATION OF CITIZENS' SETOFF RIGHT WAS NOT ITSELF A SETOFF AND DID NOT VIOLATE THE AUTOMATIC STAY.

In addressing the question presented, Strumpf argues that Citizens' imposition of an administrative freeze on his bank account, while simultaneously seeking relief from the automatic stay, violated 11 U.S.C. §362(a)(7), (a)(3), and (a)(6). *See* Respondent's Brief at 12-16. These arguments, which for the most part are addressed in the Brief for the Petitioner ("Petitioner's Brief") at 26-31, are unsound. Stated succinctly, "[t]he freeze should not be considered a violation of the stay." 4 James W. Moore & Lawrence P. King, *Collier on Bankruptcy*, ¶553.15, at 553-87 (15th ed. 1995).

A. An Administrative Hold Is Not A Setoff And Does Not Violate Section 362(a)(7).

In the Petitioner's Brief, Citizens explains that a bank's imposition of an administrative hold on a bank account pending determination of the bank's motion for relief from the automatic stay is not an act of setoff as

contemplated by 11 U.S.C. §362(a)(7). *See* Petitioner's Brief at 26-29, 35-36. The starting point for this analysis is a determination of when a setoff occurs. The predominant view, articulated in the oft-cited case of *Baker v. Nat'l City Bank of Cleveland*, 511 F.2d 1016 (6th Cir. 1975), is that an act of setoff is not complete until three steps are taken:

> (1) the decision to exercise the right;
>
> (2) some action which accomplishes the setoff; and
>
> (3) some record which evidences that the right of setoff has been exercised.

Id. at 1018. An administrative hold like the one implemented by Citizens lacks all three of the elements of a setoff. By seeking a bankruptcy court order modifying the stay to permit the setoff, Citizens clearly evidenced an intent to defer exercise of its right of setoff until the bankruptcy court authorized Citizens to act upon the right. The administrative hold alone does not accomplish a setoff, but rather preserves the *status quo* pending bankruptcy court consideration of the matter. *See* Petitioner's Brief at 26-29.

The Respondent's Brief does not address Citizens' explanation that an administrative hold is not a setoff. Instead, Strumpf does nothing other than restate the Fourth Circuit's conclusion and cite to two opinions relied on by the Fourth Circuit, *United States v. Reynolds*, 764 F.2d 1004 (4th Cir. 1985), and *United States v. Norton*, 717 F.2d 767 (3rd Cir. 1983), and one opinion which expressly declined to address the issue of whether a freeze constitutes a setoff, *In re Patterson*, 967 F.2d 505, 513 (11th Cir. 1992) ("This argument raises the issue whether a freeze constitutes a setoff, per se. However, we need not address this issue because the

bankruptcy court based its holding on more than the freeze alone."). *See* Respondent's Brief at 12. Strumpf's argument thus suffers from the same five fundamental mistakes made by the Fourth Circuit below, and is not persuasive. *See* Petitioner's Brief at 31-38.

B. An Administrative Hold Is Not An Act To Exercise Control Over Property Of The Estate And Does Not Violate Section 362(a)(3).

Strumpf readily concedes that the funds he deposited at Citizens were the property of Citizens and not the estate. *See* Respondent's Brief at 13. Nevertheless, Strumpf argues that his right to withdraw money from the account was "at least an equitable right" which became property of the estate upon his bankruptcy filing, and that Citizens' refusal to permit Strumpf to withdraw all of his bank deposits was an act to control property of the estate prohibited by §362(a)(3). *Id.* Strumpf's argument, made without support from any authority, is premised on a false assumption, namely that Strumpf had an absolute right to withdraw the funds on deposit at Citizens at the time Citizens imposed the freeze.

The relationship between a bank and its depositor is contractual. *Carman v. Franklin Bank*, 61 Md. 467, 469 (1884) ("The deposit of money in bank, by one in his own name and in his own right, creates, no doubt, the relation of debtor and creditor—the contract on the part of the bank being to pay the checks of the depositor, so long as it has funds in hand sufficient to do so."). The contractual rights that become the property of the bankruptcy estate are exactly those the depositor had prior to bankruptcy. A bankruptcy filing does not *expand* the debtor's contractual rights: "Though this paragraph

[§541(a)] will include choses in action and claims by the debtor against others, it is not intended to expand the debtor's rights against others more than they exist at the commencement of the case." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. at 367 (1977), *reprinted in*, 1978 U.S.C.C.A.N. 5787, 6323; S. Rep. No. 95-989, 95th Cong., 2nd Sess. at 82 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 5787, 5868. *Accord* 4 James W. Moore & Lawrence P. King, *Collier on Bankruptcy*, ¶541.01, at 541-7 (15th ed. 1995). A depositor's contractual right to withdraw funds from a bank account is not absolute.

In the instant case, it is undisputed that the parties' contractual relationship granted Citizens a right to set off funds in Strumpf's account to the extent of his debt to the bank. It is further conceded that Strumpf was in default and, prior to the bankruptcy filing, Citizens could have exercised its right of setoff. Strumpf's right to withdraw funds subject to Citizens' setoff right was, therefore, at Citizens' discretion; Strumpf did not have the absolute right to withdraw the funds. Upon Strumpf's bankruptcy filing, this underlying relationship did not change. Citizens' contractual rights were not diminished, and Strumpf's contractual rights did not expand to provide him with an absolute right of withdrawal that did not exist prior to his bankruptcy filing.

As Citizens set forth in the Petitioner's Brief, 11 U.S.C. §542(b) expressly entitles a creditor to retain funds otherwise payable to the debtor to the extent the creditor holds a right of setoff. *See* Petitioner's Brief at 22-24. Strumpf's §362(a)(3) argument has been rejected by several courts which recognized that the language of §542(b) prevails over §362(a)(3), including *In re Williams*, 61 B.R. 567, 573 (Bankr. N.D. Tex. 1986):

> Because Section 542(b) provides that a creditor who has a right of offset does not have to turnover the funds, it unmistakably follows that the person can continue to hold the funds (*i.e.*, an "administrative freeze" or "hold") until an order is entered by a bankruptcy court providing for disposition of the funds in question.

Citizens' exercise of this right thus is not an act to exercise control over Strumpf's right of withdrawal, because Strumpf's right of withdrawal was limited by Citizens' right to retain the funds subject to setoff. A freeze of an account, unlike a setoff, simply maintains the *status quo* and does not violate the automatic stay. *In re Tillery*, 179 B.R. 576, 580 (Bankr. W.D. Ark. 1995).

C. An Administrative Hold Is Not An Act Seeking To Collect Or Recover A Claim And Does Not Violate Section 362(a)(6).

Strumpf also argues that Citizens' administrative hold violated §362(a)(6), which provides that the automatic stay acts as a stay of "any act to collect, assess, or recover a claim against the debtor . . . ." 11 U.S.C. §362(a)(6) (1988). In making this argument, Strumpf relies on two cases, *In re Patterson*, 967 F.2d 505 (11th Cir. 1992), and *In re Figgers*, 121 B.R. 772 (Bankr. S.D. Ohio 1990).[4]

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[4]Strumpf also cites *United States v. Norton*, 717 F.2d 767 (3rd Cir. 1983), but that case does not even discuss §362(a)(6). As explained in the Petitioner's Brief, *Norton* found that a freeze constituted an act of setoff under the "automatic setoff" doctrine peculiar to Pennsylvania law, and therefore found a violation of §362(a)(7).

Patterson does hold that a credit union's freeze of the debtor's deposit account was a violation of §362(a)(6), but in so holding the Eleventh Circuit mistakenly assumed that the funds in the account were property of the bankruptcy estate, an assumption which even Strumpf acknowledges is wrong. *See Patterson*, 967 F.2d at 511. The Eleventh Circuit also premised its conclusion on the fact that the credit union coupled the administrative freeze with an attempt to coerce the debtors to pay their debt to the credit union. *Id.* at 512.

The court in *In re Figgers* also concluded that the credit union's conduct in that case violated §362(a)(6), but the facts in that case were quite different from the typical bank freeze case like the present one. In *Figgers*, as of the filing of the debtors' bankruptcy petition there was only $39.91 in the debtors' credit union account. The debtors made postbankruptcy deposits in the account, and by the time the credit union imposed a freeze based upon a prebankruptcy loan, it appears that there was $496.49 in the account. The freeze imposed by the credit union covered the entire account. *See Figgers*, 121 B.R. at 774. Consequently, the credit union clearly did violate the automatic stay, because it had no right of setoff against most of the funds it held. Moreover, the court's discussion of the law is not illuminating, as the court does not consider or even mention §542(b), the focal point of the issue before this Court.

Recognition of a depository institution's right under §542(b) to refuse to pay its debt to a bankrupt depositor to the extent of its setoff right, coupled with an understanding that the funds on deposit are the institution's property and not the estate's, should dispel any confusion suffered by the lower courts regarding the

propriety of an administrative hold. As pointed out in the Petitioner's Brief, the Bankruptcy Code's restrictions on a creditor's exercise of a setoff right on the one hand, and on a debtor's ability to obtain a turnover of funds from the creditor on the other hand, creates a purposeful statutory equilibrium which entitles the parties to protect their respective rights by maintaining the *status quo* as of the bankruptcy filing, absent a bankruptcy court order altering this balance. *See* Petitioner's Brief at 24-25. By imposing a freeze on Strumpf's account, Citizens merely exercised its right under §542(b) to decline to pay a debt subject to setoff, to preserve the parties' competing rights to the deposit while the bankruptcy court considered Citizens' motion for relief from the automatic stay. As recognized by other courts, "the administrative freeze is not an attempt to collect a debt, it is an act to maintain the status quo until the rights of the parties can be determined by the bankruptcy court." *Stann v. Mid American Credit Union*, 39 B.R. 246, 248 (D. Kan. 1984) (citing to *In re Edgins*, 36 B.R. 480, 484 (Bankr. 9th Cir. 1984)). *See In re Gifford*, 174 B.R. 231, 233 (Bankr. W.D. Ky. 1994). *Cf. in re Delaware & Hudson Railway Co.*, 127 B.R. 756, 759 (Bankr. D. Del. 1991) (sister railroad's retention of interline funds held in trust for debtor railroad in order to preserve status quo pending judicial determination of setoff did not violate §362(a)(6), also citing to *Edgins*); *In re Briggs*, 143 B.R. 438, 454 (Bankr. E.D. Mich. 1992) (freeze did not violate §362(a)(6) because it did not coerce debtor's voluntary reaffirmation of other unsecured indebtedness).

III.

CITIZENS' RIGHT TO DECLINE TO PAY ITS DEBT SUBJECT TO SETOFF UNDER SECTION 542(b) DOES NOT ARISE, AS STRUMPF ARGUES, ONLY AFTER A COURT HEARING.

Strumpf acknowledges that, "[i]t is true that under the plain language of §542(b), Citizens may decline to turnover debts due by it to the Debtor to the extent Citizens has debts due it from the Debtor . . . ." Respondent's Brief at 17. However, Strumpf argues that a creditor may not exercise this right under §542(b) until after a judicial determination of the creditor's setoff right. *Id.* at 17-19.

For this argument, Strumpf relies on the rationale of the bankruptcy court in the case of *In re Wildcat Constr. Co., Inc.*, 57 B.R. 981 (Bankr. D. Vt. 1986). In that case, the bank did exactly what Strumpf contends Citizens should have done in this case; the bank moved for *ex parte* relief from the automatic stay or for an order prohibiting the debtor from drawing on its checking accounts with the bank. The bankruptcy court denied the bank's motion on the ground that the bank did not need the requested relief because it was already adequately protected by the Code provisions prohibiting the debtor from drawing on the bank's cash collateral without the bank's consent or court authorization. *Id.* at 984-86.[5] The court further noted that the bank failed

[5]Strumpf argues that the restrictions of 11 U.S.C. §363(c)(2) on a debtor's use of cash collateral do not apply to Strumpf because he was not engaged in business. *See* Respondent's Brief at 18-19 n.5. Some lower courts do support Strumpf's argument. However, the language of §363(c)(2) is not restricted to business cases and no other provision of the Code affirmatively authorizes the use of cash collateral. A number of courts therefore have applied §363(c)(2) to nonbusiness debtors. *See, e.g., In re Owens-Peterson*, 39 B.R. 186, 189 (Bankr. N.D. Ga. 1984).

[footnote continued]

to prove that the debtor intended to remove funds from the checking account, and it refused "to presume . . . that most debtors are profligate . . . ." *Id.* at 986-87.

If *Wildcat* is instructive on any point, it is the inadequacy of the Fourth Circuit's approach to the so-called "banker's dilemma". The solution proposed by Strumpf and the Fourth Circuit—to require a bank to file an *ex parte* motion for relief from the automatic stay[6]—offers no assurance that the bank will be able to protect its setoff right despite the express provisions of the Code preserving that right. The bank may not be able to prove that absent a court order the debtor will withdraw funds on deposit, just as the bank was unable to do in *Wildcat*. And the bankruptcy judge's willingness to assume that a debtor will not violate Code provisions restricting the debtor's use of cash, and that an administrative stay is "superfluous", *id.* at 984, provides no comfort to Citizens or other depository institutions. If a depository institution is required to wait until the debtor attempts to withdraw funds, seeking judicial relief at that point would be the quintessential "attempt to lock the barn door after the horse has been stolen." *In re Edgins*, 36 B.R. 480, 484 (Bankr. 9th Cir. 1984). For proof of this point, this Court need look no further than the

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The issue of whether §363(c)(2) applies to a nonbusiness debtor has no bearing on the outcome of the present case. Citizens' right to place an administrative hold on Strumpf's account arose from Citizens' right to refuse to pay a debt subject to setoff under §542(b). Section 363(c)(2) is noteworthy, in any event, because it is perfectly consistent with the statutory equilibrium created by §§542(b), 553, and 362 between the competing rights and interests of debtors and creditors.

[6] *See Citizens Bank of Maryland v. Strumpf*, 37 F.3d 155, 157-58 (4th Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1398 (1995).

facts of this case. After Citizens was ordered by the bankruptcy court to release its administrative hold, Strumpf withdrew all of the funds on deposit, completely eliminating Citizens' setoff right and the source of payment for Strumpf's debt to the bank. *See* Petitioner's Brief at 5-6.

The problem of reading into the Bankruptcy Code a requirement that a creditor not exercise its right under §542(b) prior to a judicial determination is obvious in the context of a nonbank creditor's dealings with a debtor. As explained in the Petitioner's Brief, a debtor owed money by a creditor may approach the creditor having a right of setoff and demand immediate payment of the creditor's obligation to the debtor. Under Strumpf's argument, the creditor would not be able to decline immediate payment because the creditor was not quick enough to obtain a prior court determination of the creditor's right under §542(b) to refuse to pay the debtor to the extent of the creditor's setoff right. *See* Petitioner's Brief at 44-45. As recognized in a recent case upholding the right of the Internal Revenue Service (the "IRS") to refuse to pay an income tax refund to a Chapter 13 debtor who owed taxes to the IRS:

> Under the analysis of *Strumpf*, the moment a debtor files bankruptcy, any creditor holding funds of the debtor would be in violation of the automatic stay. Under this reasoning, the moment the creditor learns of the bankruptcy, it would be required to turnover the funds in its possession, nullifying the effect of both sections 553 and 542(b) of the Bankruptcy Code.

In re Tillery, 179 B.R. 576, 580 (Bankr. W.D. Ark. 1995).[7]

The injustice of such a result is apparent. So is the fact that a creditor's right under §542(b) to refuse to pay a debt to a bankrupt depositor is not conditioned on a prior court determination. *See* 11 U.S.C. §542(b) (1988).

IV.

STRUMPF'S RECOMMENDATION FOR COURTS TO ADOPT SPECIAL RULES FOR TAXING AUTHORITIES TO AVOID "A PLETHORA OF UNNECESSARY LITIGATION" (1) WILL NOT HELP MOST CREDITORS, AND (2) OFFERS AN INADEQUATE SOLUTION TO A PROBLEM THAT DOES NOT EXIST UNDER A CORRECT READING OF THE BANKRUPTCY CODE.

In Part IV of the Respondent's Brief, Strumpf attempts to address the concerns of the United States with respect to tax refunds and to debtors who owe income taxes to the Government. Under Citizens' view, the right of the United States to refuse to pay income tax refunds to a debtor to the extent of the Government's right of setoff is fully protected under §542(b). According to Strumpf's position, which was adopted by the Fourth Circuit below, the United States would be required to file *ex parte* motions for relief from the automatic stay in countless cases to avoid having to pay money to debtors who owe money to the Government.

Strumpf acknowledges that the United States' concerns are "legitimate", and that the prospect of numerous

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[7] It is noteworthy that the IRS's "freeze" of the debtor's tax refund in *Tillery* occurred after confirmation of the debtor's Chapter 13 plan. The court correctly concluded that confirmation did not alter the express setoff right of the IRS under §553. *Id.* at 578. *See also infra* at 4-6.

ex parte motions for relief from the automatic stay may overburden the bankruptcy courts with a "plethora of unnecessary litigation." *See* Respondent's Brief at 21-22. As a solution for these concerns and expected problems, Strumpf suggests that each of the numerous bankruptcy courts throughout the country adopt special local rules for taxing authorities. This suggestion has serious flaws.

First, relying on scores of bankruptcy courts to adopt their own versions of a rule to allow taxing authorities to exercise setoff rights without filing a motion for relief from the automatic stay is no way to engender a uniform bankruptcy law concerning the exercise of setoff rights in a bankruptcy case. Second, the Maryland local rule referred to by Strumpf is a narrow one. It authorizes the IRS and Maryland taxing authorities to offset against a tax refund owed to a debtor any taxes owed to the taxing authority by the debtor, provided that the taxing authority's claim is undisputed. *See* Rule 25(b), Local Rules of the U.S. Bankruptcy Court for the District of Maryland. Such a rule is of no help where the tax creditor's claim is disputed or the creditor is not a taxing authority. Third and most importantly, the problems addressed by Strumpf's recommendation will not exist under a correct reading of the Code, which properly considers a creditor's right under §542(b) without reading the language of §362(a) in isolation. *See Tillery*, 179 B.R. at 580 ("In *Strumpf*, the Fourth Circuit looked solely to the language of section 362, [and] ignored the provisions of sections 506, 542, 553 . . . .").

The concerns of the United States which Strumpf recognizes as legitimate are concerns of bank and non-bank creditors alike. The Bankruptcy Code properly addresses these concerns through a statutory equilibrium which balances a debtor's interests in obtaining a

turnover of funds with a creditor's interest in preserving its right of setoff. There is no need to weave a patchwork of local rules to fill a hole that exists only by virtue of Strumpf's argument.

CONCLUSION

For these reasons, and those stated in the Petitioner's Brief, the decision of the Fourth Circuit should be reversed and the case remanded for entry of the original Order issued by the district court.

Respectfully submitted,

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